93-854

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. _____

ALFRED E. HARMON, JR.,
a/k/a ALFRED E. HARMON, II, PETITIONER

VERSUS

NORTHERN INSURANCE COMPANY OF
NEW YORK AND ST. PAUL FIRE & MARINE
INSURANCE COMPANY, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was prohibited by the automatic stay provisions of the Bankruptcy Code from prosecuting his appeal against the defendant liability carriers in the Mississippi Supreme Court prior to their insured's discharge in bankruptcy;

2. Whether petitioner was entitled under pertinent provisions of the Bankruptcy Code to at least thirty (30) days after receipt of notice of their insured's discharge in bankruptcy within which to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court;and

3. Whether petitioner was entitled under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 to exclude from the delay

within which he was required by Mississippi law to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court all periods of active military service.

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE MISSISSIPPI SUPREME COURT

The names of all parties to the proceeding in the Mississippi Supreme Court appear in the caption of this case in this Honorable Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 1

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE MISSISSIPPI SUPREME COURT . . 3

TABLE OF CONTENTS 3

TABLE OF AUTHORITY 4

OPINIONS DELIVERED BELOW 8

STATEMENT OF JURISDICTION 8

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED 9

STATEMENT OF CASE. 13

REASONS FOR GRANTING WRIT. 23

CONCLUSION. 46

APPENDIX 47

TABLE OF AUTHORITY

CASES

A.H. Robins Company, Inc. v. Piccinin, 788 F.2d 994, 1001, 1002 (4th Cir. 1986) p. 26, 28-30

Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 449 (3rd Cir. 1982) p. 30

Bank of Commonwealth v. Bevan, 13 B.R. 989, 993, 994 (E.D. Mich., S.D. 1981) p. 32

Bickford v. United States, 656 F.2d 636, 639 (Ct.Cl. 1981) p. 44

Cathey v. Johns-Manville Sales Corporation, 711 F.2d 60, 62 (6th Cir. 1983), cert. denied p. 31

Conroy v. Aniskoff, 123 L Ed 2d 229, 235 (1993) p. 45

Howard v. Howard, 670 S.W. 2nd 737, 739, 740 (Tex. App. 4 Dist. 1984), rehearing denied. p. 32

In Re Circle K Corp., 121 B.R. 257 (Bkrtcy.D.Ariz. 1990) 7th Cir. 1990) p. 28

In Re Davis, 730 F.2d 176, 185 (5th Cir. 1984). p. 28-30

In Re Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991) p. 33-36, 38, 40-41

In Re Louisiana World Exposition, Inc., 832 F.2d 1391, 1398, 1399, 1401 (5th Cir. 1987) p. 23-24

In Re Martin-Trigona, 763 F.2d 503, 506 (2nd Cir. 1985) p. 32

In Re Minoco Group of Companies, Ltd., 799 F.2d 517, 519 (9th Cir. 1986) p. 26, 28-30

In Re St. Clare's Hospital and Health Center, 934 F.2d 15 (2nd Cir. 1991) p.27

In the Matter of Shondel, 950 F2d. 1301, (7th Cir. 1991) p. 27, 41

In Re Titan Energy, Inc., 837 F.2d 325, 334(footnote 15) (8th Cir. 1988) p. 24-25, 29-30

Kenney v. Churchill Truck Lines, Inc., 286 N.E.2d 619, 625(Ill. App. 4th Dist. 1972), on rehearing p. 43-44

Mason v. Texaco Inc., 862 F.2d 242 (10th Cir. 1988) p. 44

Matter of Celotex Corporation, 152 B.R. 667 (Bkrtcy M.D. Fla. Tampa Div. 1993) p. 28-29

McArthur Co. v. Johns-Manville Corp, 837 F2d. 89, 92, 93 (2nd Cir. 1988) p. 26-27, 29-30

Pope v. Manville Forest Products Corporation, 778 F.2d 238, 239 (5th Cir. 1985) p. 31

Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1975) p. 44

Sheldon v. Munford, Inc., 902 F.2d 7 (7th Cir. 1990) p. 37-38

Sherengos v. United States, 214 Ct.Cl. 749, 750 (1977) cited by the Court of Claims in Bickford v. United States, 656 F.2d 636, 639 (Ct.Cl. 1981) p. 44

Trew v. Standard Supply & Hardware Co., Inc., 33 So.2d 426, 429(La. App. Orleans Cir. 1947) p. 44

Tringali v. Hathaway Machinery Company, Inc., 796 F.2d 553 (1st Cir. 1986) p. 25, 29

Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 548, on rehearing (5th Cir. 1983), p. 28, 30

Wolf v. C.I.R., 264 F.2d 82 (3rd Cir. 1959). p. 44

STATUTES

11 U.S.C.A. § 362(a) p. 9-11, 28-30, 32, 39

11 U.S.C.A. § 362(a)(3). p. 29-30, 37, 39

11 U.S.C.A. § 362(d) p. 25, 27

11 U.S.C.A. § 362(h)	p. 39
11 U.S.C.A. § 541(a)(1)	p. 11, 23, 25-29, 31
11 U.S.C.A. 108(c)	p. 11-12, 31-32
28 U.S.C. § 1257	p. 9
50 U.S.C.A. § 525	p. 12-13, 43-45

OTHER

2 Collier on Bankruptcy 362-39 (15 ed. 1993) p. 29

HR Rep No. 95-595, 95th Cong, 1st Sess 318 (1977). (Cited in Norton Bankruptcy Law & Practice 73 Bank of Commonwealth v. Bevan, 13 B.R. 989, 993, 994 (E.D. Mich., S.D. 1981) p. 32

OPINIONS DELIVERED BELOW

The June 17, 1993 opinion of the Mississippi Supreme Court, whose judgment is sought to be reviewed, is reported in 621 So.2d 938 and is reprinted in the Appendix to this Petition. No opinion was delivered by the Mississippi Supreme Court in connection with its August 26, 1993 dismissal of petitioner's Petition for Rehearing. No opinion was delivered by the Circuit Court of the First Judicial District of Hinds County, Mississippi in connection with its June 23, 1989 dismissal of this action numbered 37,659.

STATEMENT OF JURISDICTION

A. DATE OF ENTRY OF DECISION OF MISSISSIPPI SUPREME COURT SOUGHT TO BE REVIEWED

The Mississippi Supreme Court dismissed petitioner's appeal by decision entered June 17, 1993.

B. DATE OF DENIAL OF REHEARING BY

MISSISSIPPI SUPREME COURT

The Mississippi Supreme Court denied petitioner's Petition for Rehearing by decision entered August 26, 1993.

C. BASIS FOR JURISDICTION

This Honorable Court has jurisdiction over this matter under 28 U.S.C. § 1257, by virtue of which the Supreme Court may review a decree rendered by the highest court of a state in which a decision could be had where a federal question exists.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves 11 U.S.C.A. § 362(a) which provides as follows with respect to the automatic stay provisions of the Bankruptcy Code:

"§ 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or

303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C..78eee(a)(3)), operates as a stay, applicable to all entities, of-

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor."

This case further involves 11 U.S.C.A. § 541(a)(1) which provides as follows with respect to the property comprising the bankrupt's estate under the Bankruptcy Code:

§ 541. Property of the estate

"(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case."

This case further involves 11 U.S.C.A. § 108(c) which provides as follows with respect to extensions of time under the Bankruptcy Code:

§ 108. Extension of time

"(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of-

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim."

This case further involves 50 U.S.C.A. § 525 which provides as follows with respect to exclusions from limitations periods of periods of active military service under the Soldier' and Sailors' Civil Relief Act of 1940:

§ 525. Statutes of limitations as affected by period of service

The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service, nor shall any part of such period which occurs after October 6, 1942 be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment."

STATEMENT OF CASE

A. NATURE OF THE CASE

This is a tort action for damages arising out of the sexually deviant conduct of petitioner's father, Alfred E. Harmon(hereinafter referred to as "Doctor Harmon").

B. COURSE OF PROCEEDINGS AND DISPOSITION OF DOCTOR HARMON'S BANKRUPTCY CASE

1. Doctor Harmon initiated bankruptcy proceedings on June 9, 1989;

2. Petitioner filed a proof of claim on July 31, 1989;

3. Doctor Harmon was discharged in bankruptcy on August 24, 1990;and

4. Petitioner's undersigned counsel of record received notice of Doctor Harmon's discharge in bankruptcy on August 31, 1990.

C. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE IN MISSISSIPPI STATE TRIAL COURT

1. This action was dismissed by order of the Mississippi state trial court dated June 23, 1989;

2. By letter dated July 21, 1989, petitioner's undersigned counsel of record advised the Honorable L. Breland Hilburn, the Trial Judge in this case, that he had received notice of the initiation by Doctor Harmon of bankruptcy proceedings on June 9, 1989, a machine copy whereof was enclosed therewith for

Judge Hilburn's records. By the aforesaid letter, said undersigned counsel of record informed Judge Hilburn that, having reviewed numerous state and federal decisions from around the country as well as pertinent federal legislation, he had reached the following conclusions:

> "A. A bankrupt's liability insurers are protected by the automatic stay provisions of the Bankruptcy Code;
>
> B. A creditor prohibited by the automatic stay provisions from continuing an action is entitled to at least 30 days after notice of the termination or expiration of the stay within which to take action theretofore prohibited by the stay; and
>
> C. Any action taken after the initiation of the bankruptcy proceedings but before the termination or expiration of the stay is absolutely null and void."

Machine copies of the aforesaid letter and the aforesaid notice were additionally forwarded to both opposing counsel as well as to The Honorable

Barbara Dunn, Clerk of the Trial Court.

3. By letter dated April 4, 1990, said undersigned counsel counsel of record advised the Honorable William F. Coleman, Circuit Judge, as follows:

"A. That defendant Alfred E. Harmon had initiated bankruptcy proceedings on June 9, 1989, and that as a result thereof, plaintiff in this case was prohibited from prosecuting his appeal against his father's liability insurers unless and until he had received notice of the termination or expiration of the automatic stay provided by the Bankruptcy Code;

B. That said undersigned counsel had received no notice of the termination or expiration of the stay, and, accordingly, intended to file pleadings in the Bankruptcy Court appropriate to obtain authorization to proceed with the prosecution of this case;

C. That this case, as it pertains to the defendant liability insurers, had been dismissed by order signed by Judge Hilburn on June 23, 1989, and that plaintiff, for the reasons set forth in said undersigned counsel's letter to Judge Hilburn dated July 21, 1989, had been prohibited from

prosecuting his appeal since that time: and

D. That plaintiff intended to prosecute his appeal against his father's liability insurers at such time as he had received notice of the termination or expiration of the automatic stay."

Machine copies of this letter were forwarded to Judge Hilburn, both opposing counsel and Clerk of Court Dunn.

4. By letter dated May 8, 1990, said undersigned counsel of record advised Judge Hilburn that he had been recently informed that Alfred E. Harmon should be discharged in bankruptcy within approximately two months, and, accordingly, he no longer believed it necessary to file pleadings in the Bankruptcy Court appropriate to obtain authorization to proceed with the prosecution of this case. Machine copies of this letter were forwarded to both opposing counsel as well as Clerk of

Court Dunn.

5. By letter dated September 7, 1990, said undersigned counsel of record informed Judge Hilburn that he had received notice on August 31, 1990 that Doctor Harmon had been discharged in bankruptcy on August 24, 1990, and that by virtue of said discharge in bankruptcy, petitioner was no longer prohibited from proceeding against his father's liability carriers, a machine copy whereof was enclosed therewith for Judge Hilburn's records. Machine Copies of this letter and notice were additionally forwarded to both opposing counsel as well as to Clerk of Court Dunn.

6. Petitioner's notice of appeal was filed in the trial court on September 21, 1990;

D. COURSE OF PROCEEDINGS AND DISPOSITION OF CASE IN MISSISSIPPI SUPREME COURT

1. The federal question whether petitioner was prohibited by the automatic stay provisions of the Bankruptcy Code from prosecuting his appeal against the defendant liability carriers in the Mississippi Supreme Court prior to their insured's discharge in bankruptcy was raised by petitioner through the filing on October 18, 1990 of his Brief in Opposition to defendant liability carriers' Motion to Docket and Dismiss. Petitioner cited pertinent provisions of the Bankruptcy Code and numerous federal decisions in this Brief as authority for the principle that he was prohibited by the automatic stay provisions of the Bankruptcy Code from prosecuting his appeal against the defendant liability carriers in the Mississippi Supreme Court prior to their insured's discharge in bankruptcy. Moreover, petitioner presented further

argument in support of this principle through the filing of his Second Brief in Opposition to defendant liability carriers' Motion to Docket and Dismiss.

2. The federal question whether petitioner was entitled under pertinent provisions of the Bankruptcy Code to at least thirty(30) days after receipt of notice of Doctor Harmon's discharge in bankruptcy within which to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court was raised by petitioner through the filing on October 18, 1990 of his Brief in Opposition to defendant liability carriers' Motion to Docket and Dismiss. Petitioner cited pertinent provisions of the Bankruptcy Code and several state and federal decisions in this Brief as authority for the principle that he was entitled under pertinent

provisions of the Bankruptcy Code to at least thirty(30) days after receipt of notice of Doctor Harmon's discharge in bankruptcy within which to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court.

3. The Mississippi Supreme Court, in holding that petitioner was not prohibited by the automatic stay provisions of the Bankruptcy Code from prosecuting his appeal against his father's liability carriers prior to defendant Harmon's discharge in bankruptcy, dismissed petitioner's appeal by decision entered June 17, 1993 as being untimely filed;

4. The federal question whether petitioner was entitled under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 to exclude from the delay within which he was required by

Mississippi law to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court all periods of active military service was raised by petitioner through the filing on July I, 1993 of his Petition for Rehearing. Petitioner cited pertinent provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 and several state and federal federal decisions in this Brief as authority for the principle that he was entitled under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 to exclude from the delay within which he was required by Mississippi law to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court all periods of active military service.

5. The Mississippi Supreme Court denied petitioner's Petition for Rehearing by decision entered August 26,

1993. No opinion was delivered in connection with this denial.

This case now comes before this Honorable Court for review.

REASONS FOR GRANTING WRIT

11 U.S.C.A. § 541(a)(1) includes within a debtor's estate ". . . all legal or equitable interests of the debtor in property as of the commencement of the case." Although the bankrupt in In Re Louisiana World Exposition, Inc., 832 F.2d 1391, 1398, 1399, (5th Cir. 1987), owned the liability policies at issue in that case, " . . . the obligation of the insurance companies was only to the directors and officers and they are the named and only insureds." Accordingly, the court in In Re Louisiana World Exposition, Inc., supra at 1401, held that " . . . the liability proceeds, which belong only to the directors and officers, are not part of the estate . .

." In the instant case, Doctor Harmon has an ownership interest in both the liability policies at issue as well as the proceeds thereof. For these reasons, the holding in In Re Louisiana World Exposition, Inc. is inapposite to the instant case. It is noteworthy, however, that the court in In Re Louisiana World Exposition, Inc., supra at 1399, recognized that ". . .(t)here are a great many bankruptcy cases holding that liability insurance policies that provide coverage for the bankrupt's liability belong to the bankrupt's estate." The Eighth Circuit Court of Appeals, in In Re Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988), observed that if the policies at issue in that case were ". . . held to cover the damage claims, that holding will reduce the total amount of damage claims lodged against the estate"(,) and held such policies to be ". . . property

of Titan's estate because the estate is worth more with them than without them." Moreover, the court in footnote 15 on page 334 deemed this holding to trigger the automatic stay provisions of the Bankruptcy Code. However, the court in said footnote construed 11 U.S.C.A. § 362(d) as allowing " . . . the bankruptcy court to lift the stay 'on request of a party in interest and after notice and a hearing.'" The First Circuit Court of Appeals, in Tringali v. Hathaway Machinery Company, Inc., 796 F.2d 553 (1st Cir. 1986), recognized that "(e)very court that has recently considered the specific question had held that liability insurance falls within the scope of § 541(a)(1)" and deemed § 541(a)(1) ". . . broad enough to cover an interest in liability insurance, namely, the debtor's right to have the insurance company pay money to satisfy one kind of debt--debts

accrued through, for example, the insured's negligent behavior." In In Re Minoco Group of Companies, Ltd., 799 F.2d 517, 519 (9th Cir. 1986), the Ninth Circuit Court of Appeals deemed the liability policy at issue in that case to be property of the estate within the contemplation of § 541(a)(1) ". . . because the debtor's estate is worth more with them than without them." The Fourth Circuit Court of Appeals, in A.H. Robins Company, Inc. v. Piccinin, 788 F.2d 994, 1001 (4th Cir. 1986), cert. denied, observed that "(u)nder the weight of authority, insurance contracts have been said to be embraced in this statutory definition of "'property'". In McArthur Co. v. Johns-Manville Corp, 837 F2d. 89, 92, 93 (2nd Cir. 1988), cert. denied, the Second Circuit Court of Appeals observed that "(n)umerous courts have determined that a debtor's insurance policies are

property of the estate, subject to the bankruptcy court's jurisdiction" and deemed the liability policies at issue in that case to be property of the estate within the contemplation of § 541(a)(1). The Second Circuit Court of Appeals, in In Re St. Clare's Hospital and Health Center, 934 F.2d 15 (2nd Cir. 1991), reiterated its view that " . . . the debtor's rights under its insurance policies are property of a debtor's estate under § 541(a) . . ." In In the Matter of Shondel, 950 F2d. 1301, (7th Cir. 1991), the Seventh Circuit Court of Appeals recognized that "(t)he dominant view is that insurance policies that provide coverage for the debtor's liability are property of the debtor's estate." Other decisions of the Fifth Circuit Court of Appeals recognizing liability policies to be property of the estate within the contemplation of §

541(a)(1) include Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 548, on rehearing (5th Cir. 1983), and In Re Davis, 730 F.2d 176, 185 (5th Cir. 1984). In In Re Circle K Corp., 121 B.R. 257 (Bkrtcy.D.Ariz. 1990) 7th Cir. 1990) the bankruptcy court(citing, among other cases, In Re Minoco Group of Companies, Ltd. and A.H. Robins Company, Inc., both of which being cited hereinabove) held that the bankrupt debtor's indemnification insurance policies covering its present and former directors and officers were the property of the bankruptcy estate and that, accordingly, the continued prosecution of security litigation against the bankrupt debtor and two of its former executive officers would violate the automatic stay provisions afforded by 11 U.S.C.A. § 362(a). In Matter of Celotex Corporation, 152 B.R. 667 (Bkrtcy M.D.

Fla. Tampa Div. 1993), the bankruptcy court, citing MacArthur, In Re Titan Energy, Tringali, A.H. Robins, In Re Minoco Group and In Re Davis, observed that "(c)ircuit courts in at least five circuits, including this one, have held that insurance coverage is property of the bankruptcy estate." "The prevailing view is that an insurance policy is property of the estate, protected by the automatic stay of section 362(a)(3)." 2 Collier on Bankruptcy 362-39 (15 ed. 1993).

It being well-settled, as above set forth, that liability policies constitute property of the estate within the contemplation of § 541(a)(1), the protection afforded by the automatic stay provisions of the Bankruptcy Code extends to a bankrupt's liability insurers. The Fourth Circuit Court of Appeals in A.H. Robins Company, Inc. v. Piccinin, supra

at 1001, 1002, deemed liability insurers to be entitled to the protection afforded by 11 U.S.C.A. § 362(a)(3). See also In Re Minoco Group of Companies, Ltd., supra at 519; McArthur Co. v. Johns-Manville Corp., supra at 92; In Re Davis, supra at 184; Wedgeworth v. Fibreboard Corp., supra at 548; In Re Titan Energy, Inc., supra at 334(footnote 15).

The Third Circuit Court of Appeals, in Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 449, construed Section 362 to ". . . stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the

petition in bankruptcy occurs." See also Cathey v. Johns-Manville Sales Corporation, 711 F.2d 60, 62 (6th Cir. 1983), cert. denied. The Fifth Circuit Court of Appeals, in Pope v. Manville Forest Products Corporation, 778 F.2d 238, 239 (5th Cir. 1985) recognized that "(a) stay granted against an action in district court continues until the bankruptcy case is closed, dismissed, or discharge is granted or denied, or until the bankruptcy court grants some relief from the stay."

11 U.S.C.A. 108 "Subsection (c) extends the statute of limitations for creditors. Thus, if a creditor is stayed from commencing or continuing an action against the debtor because of the bankruptcy case, then the creditor is permitted an additional 30 days after notice of the event by which the stay is terminated, whether that event be relief

from the automatic stay under proposed 11 USC 362 or 1301, the closing of the bankruptcy case (which terminates the stay), or the exception from discharge of the debts on which the creditor claims." HR Rep No. 95-595, 95th Cong, 1st Sess 318 (1977). (Cited in Norton Bankruptcy Law & Practice 73; Bank of Commonwealth v. Bevan, 13 B.R. 989, 993, 994 (E.D. Mich., S.D. 1981). Various decisions have held, pursuant to Section 108(c), a creditor prohibited by the automatic stay provisions form continuing an action to be entitled to at least 30 days after notice of the termination or expiration of the stay within which to take action theretofore prohibited by the stay. See Bank of Commonwealth v. Bevan, supra at 993, 994; In Re Martin-Trigona, 763 F.2d 503, 506 (2nd Cir. 1985); Howard v. Howard, 670 S.W. 2nd 737, 739, 740 (Tex. App. 4 Dist. 1984), rehearing denied.

For the following reasons, the instant case is clearly distinguishable from In Re Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991), cited by the Mississippi Supreme Court in its opinion rendered on June 17, 1993.

In Re Fernstrom, supra at 733-737, involved a motion for relief from the automatic stay provisions of the Bankruptcy Code, following the assertion by the bankrupt debtor of its pending bankruptcy proceeding as a bar to its creditor's suit against it only after failing to do so for six years during which extensive litigation had taken place, which had been granted by the bankruptcy court and upheld on appeal to the district court. After analyzing the merits of said motion, the court affirmed the decision of the district court, thereby allowing the creditor's suit against the bankrupt debtor to

proceed. To the extent that no motion for relief from automatic stay was filed by any party to this case in connection with the bankrupt debtor's bankruptcy proceeding, the holding of In Re Fernstrom is inapposite to the instant case.

Although the creditor of the bankrupt debtor in In Re Fernstrom, supra at 733, failed to file a proof of claim for its computer equipment destroyed by fire while stored in the bankrupt debtor's warehouse, plaintiff in the instant case did file a proof of claim on July 31, 1989 in the bankrupt debtor's bankruptcy proceeding even though he was, technically, not required to do so in view of the apparent absence of assets from which dividends could be paid to creditors. Machine copies of plaintiff's proof of claim, with filing information indicated thereon, and acknowledgement by the clerk of the bankruptcy court that

plaintiff's claim had been filed on July 31, 1989 were attached to and made a part of petitioner's Petition for Rehearing.

Although the creditor of the bankrupt debtor in In Re Fernstrom, supra at 733, " . . . had stipulated that it would only seek to recover up to the $750,000 limit provided in Fernstrom's insurance policies, meaning that if the dismissed district court action were reinstated and IBM won, its claim would be satisfied solely from the proceeds of Fernstrom's insurance[,]" in the instant case no such stipulation has been made by plaintiff. Moreover, by filing a proof of claim, plaintiff clearly manifested his intention to preserve any and all rights existing in his favor against the bankrupt debtor.

Although " . . . under IBM's agreement to claim damages only to the limit of Fernstrom's liability coverage,

its potential recovery against Fernstrom will not extend beyond the proceeds of Fernstrom's insurance policies[,]" the potential recovery against Dr. Harmon by petitioner and by petitioner's sister, Mary Catherine Harmon, as of the date of the institution of bankruptcy proceedings by Dr. Harmon, would have, to a reasonable possibility, extended beyond the proceeds of Dr. Harmon's liability coverage. In Re Fernstrom, supra at 736. Of course, in view of the inability of plaintiff to have definitively quantified the victims of Dr. Harmon's sexually deviant conduct, it was unknown, as of the date of the institution of bankruptcy proceedings by Dr. Harmon, whether additional causes of action against Dr. Harmon, a former prominent Crowley, Louisiana family practioner, existed.

Although this Honorable Court, in its opinion rendered on June 17, 1993, found that " . . . it is unusual for the plaintiff in a case such as this to seek protection under the umbrella of the automatic stay provisions[,] . . . " plaintiff, rather than seeking protection, was seeking to avoid violation of the automatic stay provisions afforded by 11 U.S.C.A. § 362(a)(3). It is noteworthy that at the time the bankrupt debtor initiated bankruptcy proceedings, he remained as a named defendant in the instant case and, therefore, at least potentially liable to plaintiff, notwithstanding the fact that he had not been served with process and the fact that liability insurance coverage apparently existed in his favor. See Sheldon v. Munford, Inc., 902 F.2d 7

(7th Cir. 1990) wherein the court (same court having decided In Re Fernstrom, supra, and despite contrary decisions in the Third and Tenth federal Circuit Courts of Appeal) found that the automatic stay provisions afforded by 11 U.S.C.A. § 362(a) prohibited the bankrupt debtor's appeal of a money judgment against it(taken by the bankrupt debtor prior to initiating bankruptcy proceedings) from going forward even though the bankrupt debtor had posted a supersedas bond(prior to initiating bankruptcy proceedings) rendering Insurance Company of North America jointly and severally liable for the judgment with it. Accordingly, from the time the bankrupt debtor initiated bankruptcy proceedings, plaintiff was prohibited from prosecuting this case, and, had he done so, he would have apparently done so in violation of the

automatic stay provisions afforded by 11 U.S.C.A. § 362(a)(1). At the time the bankrupt debtor initiated bankruptcy proceedings, plaintiff in the instant case was placed between the proverbial "rock and a hard place". Had plaintiff continued prosecuting this case, he would have done so subject to being held in contempt of the bankruptcy court for having violated the automatic stay provisions and further subject to the actual and punitive damages afforded by 11 U.S.C.A. § 362(h) in favor of a party injured by such violation. On the other hand, plaintiff's seeking to avoid violation of the automatic stay provisions afforded by 11 U.S.C.A. § 362(a)(3) has resulted in his suit being dismissed. A party in plaintiff's position should not be required to choose between these equally-unacceptable results. Although plaintiff could have

initiated proceedings in the bankruptcy court appropriate to obtain authorization to proceed with the prosecution of this case, he was under no obligation to do so, and, even had he elected to do so, it is doubtful that such authorization could have been obtained prior to the expiration of the appeal delay.

Although the bankrupt debtor in In Re Fernstrom, supra at 735, argued " . . . that the proceeds of its insurance policies are property of the bankruptcy estate, meaning that a suit which seeks to recover tnese proceeds is a suit against the debtor[,]" the court merely noted this argument, without addressing same("So it is, at least nominally" was the court's specific response to this argument), preparatory to a somewhat lengthy discussion involving the appropriateness of "suspending the stay". Accordingly, it does not appear that In Re

Fernstrom should be construed as having held that the proceeds of the bankrupt debtor's insurance policies were not the property of the bankruptcy estate. Of course, even in the event that In Re Fernstrom could be so construed, such a holding would directly conflict with the numerous federal decisions to the contrary cited hereinabove, including In the Matter of Shondel, supra, decided by the Seventh Circuit Court of Appeals subsequent to its decision in In Re Fernstrom.

By virtue of the above and foregoing decisions, the Mississippi Supreme Court has decided the following federal questions in a way that conflicts with the prevailing view of the United States Courts of Appeal:

A. Whether petitioner was prohibited by the automatic stay provisions of the Bankruptcy

Code from prosecuting his appeal against the defendant liability carriers in the Mississippi Supreme Court prior to their insured's discharge in bankruptcy;and

B. Whether petitioner was entitled under pertinent provisions of the Bankruptcy Code to at least thirty(30) days after receipt of notice of Doctor Harmon's discharge in bankruptcy within which to prosecute his appeal against the defendant liability carriers in the Mississippi Supreme Court.

During the preparation of petitioner's Petition for Rehearing in the Mississippi Supreme Court, the undersigned counsel of record contemplated for the first time the possibility that the provisions of the

Soldiers' and Sailors' Civil Relief Act of 1940(50 U.S.C.A. §501-591, as amended from time to time) prohibited the dismissal of petitioner's appeal by the Mississippi Supreme Court. Upon reviewing these provisions and pertinent jurisprudence interpreting them, it appears that, for the following reasons, they do in fact prohibit the dismissal of petitioner's appeal. Moreover, petitioner's inadvertent failure to bring this issue to the attention of the Mississippi Supreme Court prior to the filing of his Petition for Rehearing " . . . does not make the applicability of the federal act any less pertinent." Kenney v. Churchill Truck Lines, Inc., 286 N.E.2d 619, 625(Ill. App. 4th Dist. 1972), on rehearing. It appears to be well-settled that § 525 of the Soldiers' and Sailors' Civil Relief Act of 1940 " . . . mandates the exclusion from all

limitations periods of any period of active service." Sherengos v. United States, 214 Ct.Cl. 749, 750 (1977), cited by the Court of Claims in Bickford v. United States, 656 F.2d 636, 639 (Ct.Cl. 1981). See also Wolf v. C.I.R., 264 F.2d 82 (3rd Cir. 1959). Stated another way, "(t)he Act bars any period of military service from being included in computing a statute of limitations for or against a person in the military service." Mason v. Texaco Inc., 862 F.2d 242 (10th Cir. 1988). Moreover, it appears to be equally well-settled that § 525 of the Soldiers' and Sailors' Civil Relief Act of 1940 is unconditional. See Trew v. Standard Supply & Hardware Co., Inc., 33 So.2d 426, 429(La. App. Orleans Cir. 1947); Kenney v. Churchill Truck Lines, Inc., supra at 625; Ricard v. Birch, 529 F.2d 214, 217 (4th Cir. 1975); Bickford v. United States, supra at 639.

Additionally, as this Honorable Court observed in Conroy v. Aniskoff, 123 L Ed 2d 229, 235 (1993), "(t)he statutory command in § 525 is unambiguous, unequivocal, and unlimited."

Plaintiff enlisted in the United States Navy in December, 1986 and has been on active duty in the United States Navy continuously, without interruption, from December, 1986 through June 29, 1993. All of this was set forth in petitioner's affidavit dated June 29, 1993 attached to and made a part of petitioner's Petition for Rehearing.

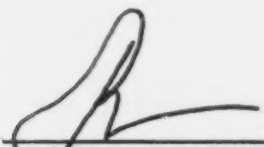
No opinion was delivered by the Mississippi Supreme Court in connection with its denial of petitioner's Petition for Rehearing by decision entered August 26, 1993. However, for the above and foregoing reasons, it appears that the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 do in fact

prohibit the dismissal of petitioner's appeal by the Mississippi Supreme Court.

CONCLUSION

WHEREFORE, petitioner prays that for the above and foregoing reasons, a writ of certiorari issue to review the decision of the Mississippi Supreme Court entered June 17, 1993 and, after due consideration, said decision be reversed and this case be remanded to the Mississippi Supreme Court for further proceedings.

Respectfully submitted,



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APPENDIX

The June 17, 1993 opinion of the Mississippi Supreme Court, whose judgment is sought to be reviewed, is reprinted in this Appendix.

DECIDED JUN 17 1993

IN THE SUPREME COURT OF MISSISSIPPI

NO. 90-CA-1015

ALFRED E. HARMON, JR.,A/K/A ALFRED E. HARMON,II

v.

NORTHERN INSURANCE COMPANY OF NEW YORK AND ST. PAUL FIRE & MARINE INSURANCE COMPANY

BEFORE HAWKINS, C.J., McRAE AND ROBERTS, JJ. ROBERTS, JUSTICE, FOR THE COURT:

Alfred E. Harmon, Jr., an adult non-resident, alleged that Alfred E. Harmon, Sr., his father, sexually abused him between the years of 1977 and 1983. Harmon, Jr. filed a complaint for damages and named his father and his father's insurance carriers, Northern Insurance

Company of New York and St. Paul Fire & Marine Insurance Company, as defendants. The parties involved in this case are residents of the State of Louisiana; the alleged tort occurred in Louisiana; and the insurance contracts were issued in Louisiana. However, the two insurance carriers conduct business in Mississippi. Apparently the action was time-barred in Louisiana and Harmon, Jr. sued in the State of Mississippi where the six-year statute of limitations did not bar this action.

The insurers filed a Motion to Dismiss due to the untimeliness of its appeal. The Hinds County Circuit Court granted the defendant-insurers' Motion to Dismiss on the basis that Mississippi does not recognize a plaintiff's right to directly sue an insurance carrier, otherwise known as a Direct Action Statute. Harmon, Jr. has appealed

contending that Mississippi is bound to follow the Louisiana Direct Action Statute. The insurers filed a Motion to Docket and Dismiss with this Court. This Motion was passed along for consideration with the case on the merits. As we grant the Motion to Docket and Dismiss, we do not consider any issue on its merits.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Alfred E. Harmon, Jr. (Harmon, Jr.) alleges he was sexually abused by his father, Alfred E. Harmon, Sr. (Harmon, Sr.), between December 15, 1977, and August 22, 1983, in Louisiana. On February 17, 1989, Harmon, Jr., filed a complaint against Harmon, Sr. and two of his liability insurers, Northern Insurance Company of New York (Northern) and St. Paul Fire and Marine Insurance

Company (St. Paul) in the Circuit Court of Hinds County, Mississippi, seeking a joint and several judgment of twelve million dollars ($12,000,000). Harmon, Sr. has never been served process in this case. Northern and St. Paul filed a Motion to Dismiss prior to answering the complaint. The motion was heard in the Hinds County Circuit Court on March 31, 1989. On June 23, 1989, the insurers' Motion to Dismiss was granted.

Harmon, Jr. filed his Notice of Appeal to this Court on September 19, 1990, approximately one year and three months from the date of the order granting Northern and St. Paul's Motion to Dismiss. Upon receiving notification of the appeal to this Court, the insurers field a Motion to Docket and Dismiss with this Court. Both Northern and St. Paul claim, pursuant to Miss. S.Ct. R. 4(a), that not only is Harmon, Jr.'s appeal

time-barred, but that Miss. S.Ct. R. 2 mandates dismissal of the case. Furthermore, the insurers claim that the appeal is frivolous since Mississippi law forbids direct action suits against insurance companies, thereby making sanctions against counsel for Harmon, Jr. appropriate.

In response to the insurers' action, Harmon, Jr. filed a brief in opposition to the Motion to Docket and Dismiss. In that brief, Harmon, Jr. alleges that by a letter dated July 21, 1989, one of Harmon, Jr.'s attorneys advised the lower court that notice had been received of the initiation by Harmon, Sr., of bankruptcy proceedings on June 9, 1989. Harmon, Jr. alleges that under federal bankruptcy law, these proceedings stayed his appeal against his father's insurance carriers, and furthermore, would not penalize him under any prescribed time

limit during the stay. Harmon, Jr's notice of appeal was filed September 21, 1990, within 30 days of Harmon, Jr. receiving notice on August 24, 1990 that his father had been discharged in bankruptcy, thereby allowing the appeal to go forward.

The Motion to Docket and Dismiss was passed for consideration along with the merits of the appeal.

DISCUSSION

Harmon, Jr. sets forth only one issue to be considered by this Court; but we must first consider the Motion to Docket and Dismiss. As we grant Northern and St. Paul's Motion to Docket and Dismiss, we need not address the choice of law question raised by Harmon, Jr.

The issue before this Court involves only questions of law. "[W]hen passing upon points of law decided in a trial

court, our review is de novo." Derouen v. Murray, 604 So. 2d 1086, 1092 (Miss. 1992). See, e.g., Rawls v. Parker, 602 So. 2d 1164, 1167 (Miss. 1992); Stevenson v. Stevenson, 579 So. 2d 550, 553 (Miss. 1991); Planters Bank & Trust Co. v. Sklar, 555 So. 2d 1024, 1028 (Miss. 1990); Cole v. Nat'l Life Ins. Co., 549 So. 2d 1301, 1303 (Miss. 1989).

I.

THIS ACTION SHOULD BE DISMISSED UNDER MISSISSIPPI SUPREME COURT RULE 4(a) FOR HARMON, JR.'S FAILURE TO GIVE TIMELY NOTICE OF APPEAL TO THIS COURT

A.
THE AUTOMATIC STAY PROVISIONS OF THE BANKRUPTCY CODE, 11 U.S.C. § 362(a), DO NOT APPLY TO CO-DEFENDANTS

Harmon, Jr. filed an appeal with this Court from the dismissal of his case by the Hinds County Circuit Court one year and three months after the deadline

for a timely appeal imposed by Mississippi Supreme Court Rule 4(a).[1] Harmon, Jr. alleges that any further actions against his father and his father's insurance carriers were stayed as a result of the notification he received that his father had filed bankruptcy.

Harmon, Jr. bases his argument that he could not proceed in this action on 11 U.S.C. § 362(a), which provides in pertinent part:

(a) Except as provided in

---

[1]Miss. S.Ct. R. 4(a) states, in pertinent part:

> (a) Appeals and Cross-Appeals in Civil and Criminal Cases. In a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to this Court the notice of appeal required by rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. . . .

> subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of-
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> > (2) the enforcement, against the debtor or against the property of the estate, of a judgment obtained before the commencement of the case under this title;
> > (3) any act to obtain possession of property of the estate or of property from the estate;
> >
> > ***
> >
> > (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; ....

11 U.S.C. § 362(a). Harmon, Jr. contends that § 362(a) precluded him from proceeding in any further action against his father and his father's liability

carriers. In addition, Harmon, Jr. contends that § 362(a) also prohibited him from prosecuting his appeal against his father's liability insurers until he had received notice of the termination or expiration of the automatic stay. See also 11 U.S.C. § 108(c). The insurers contend that it is well-established that the automatic stay provisions of the bankruptcy code do not apply to co-defendants or co-tortfeasors.

The automatic stay provisions serve the purposes of giving the debtor some breathing room from creditors, and protecting creditors from those creditors who would act in such a way as to obtain payment from the debtor to the detriment of other creditors. **Croyden Assoc. v. Alleco, Inc.,** 969 F.2d 675, 677 (8th Cir. 1992); **Maritime Electric Co., Inc. v. United Jersey Bank,** 959 F.2d 1194, 1204 (3rd Cir. 1991) (citing **Association of**

St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448 (3rd Cir. 1982)).

In Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983), the Fifth Circuit resolved the question of whether or not section 362(a) mandated a stay of the proceedings against co-defendants, as well as the debtor. The court said:

> [a]lthough judicial interpretation [regarding section 362(a)] is checkered as to the extent of this statutorily required stay, resolution of the question presented requires a walk down a path as yet unblazed by this court. At trail's end we conclude that § 362 does not operate as an automatic stay of claims against the co-defendants. . . .

Wedgeworth, 706 F.2d at 544. See also In re White Motor Credit Corp., 37 B.R. 631, 644-645 (D.C. 1984); Sassau v. Louisiana Workover Service, Inc., 607 So. 2d 809, 812 (La.Ct.App. 1992) ("We find further support for our position in the federal jurisprudence which holds that a stay in

bankruptcy as to one defendant has no effect on claims pending against a co-defendant in the same suit.").

The Fifth Circuit reached its conclusion that the automatic stay provision did not apply to co-defendants by examining the language of the statute itself, which focuses on the insolvent party, and not on third parties or co-defendants to a particular action. **Wedgeworth,** 706 F.2d at 544. The Third Circuit has also addressed this issue: "[t]he automatic stay is not available to non-bankrupt co-defendants of a debtor even if they are in a similar legal or factual nexus with the debtor." **Maritime Electric Co.,** 959 F.2d at 1205 (citing **Lynch v. Johns-Manville Sales Corp.,** 710 F.2d 1194, 1196-1197 (6th Cir. 1983)).

Although § 362(a) states that the automatic stay applies "to all entities," courts have interpreted that to mean the

debtor, the debtor's property or the debtor's estate. In re Anje Jewelry Co., Inc., 47 B.R. 485, 486 (E.D. N.Y. 1983) (citing In re Casgul of Nevada, Inc., 22 B.R. 65, 66, 6 C.B.C.2d 1351, 1353, 9 B.C.D. 449, 450 (Bkrtcy.App., 9th Cir. 1982)). See also In the Matter of Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969, 977 (N.D. Ill 1992) ("Section 362(a)(1) applies only to actions against the debtor....Related litigation goes on without the debtor.").

Based on the foregoing, we find that the automatic stay provisions of § 362(a) did not stay further action by Harmon, Jr. against his father's insurance carriers. Therefore, it did not relieve Harmon, Jr. of the obligation to make a timely appeal under Miss. S.Ct. Rule 4(a) in the action against his father's insurers, Northern and St. Paul.

B.

THE INSURANCE POLICIES AND THE PROCEEDS FROM THE POLICIES ARE NOT THE PROPERTY OF THE BANKRUPT'S ESTATE AND THEREFORE ARE NOT SUBJECT TO THE AUTOMATIC STAY PROVISIONS OF SECTION 362 (a).

Harmon, Jr. claims that the insurance policies issued to Harmon, Sr. and the corresponding proceeds are the property of the bankruptcy estate and are therefore subject to the automatic stay provisions of 11 U.S.C. § 362(a) pursuant to 11 U.S.C. § 541. We disagree.

Section 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the estate." Section 541(d) limits that definition somewhat by bringing into the estate property "which the debtor holds, as of commencement of the case, only legal title and not equitable interest, ... only to the

extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." In re Correct Mfg. Corp., 88 B.R. 158, 161 (S.D. Ohio 1988). Although the Bankruptcy Court in Correct concluded that the insurance contracts in a Chapter 7 reorganization belonged to the bankruptcy estate, the court determined that "[t]he estates' interests do not encompass the right to receive the proceeds of the insurance policies." Id. at 162. See also In re Louisiana World Exposition, Inc., 832 F.2d 1391, 1399 (5th Cir. 1987) (quoting In re Gagnon, 26 B.R. 926, 928 (M.D.Pa. 1983)) ("the estate's legal and equitable interests in property rise no higher than those of the debtor"). Insurance proceeds are not intended for the insured's use; they are intended for the benefit of the injured

party under the provisions of the policies issued.

There are cases which have held that insurance policies and proceeds are the property of the bankruptcy estate. See, e.g., MacArthur Co. v. Johns-Manville Corp., 837 F.2d 89, 92 (2d Cir. 1988); In re Forty-Eight Insulations, Inc. 54 B.R. 905 (N.D. Ill. 1985); In re Johns-Manville Corp., 26 B.R. 420 (S.D.N.Y. 1983), aff'd, 40 B.R. 219 (S.D.N.Y. 1984). However, there is a major distinguishing characteristic between most of those cases and the case sub judice. Most of those cases involved corporate bankruptcy proceedings and large class action litigation, and they were primarily concerned with the insurance policies and the proceeds from the standpoint of numerous plaintiffs, not a single plaintiff.

In re Fernstrom, 938 F.2d 731 (7th

Cir. 1991) distinguished itself from the large tort liability cases. In Fernstrom, the debtor claimed that certain proceeds from an insurance policy were the property of the bankruptcy estate, and that the claimed beneficiary under the policy should be enjoined from proceeding. The Bankruptcy Court declined to apply the reasoning of the mass tort litigation cases here, due to the lack of similar policy concerns. Id. at 736. The Seventh Circuit noted that although the plaintiff would exhaust all of Fernstrom's liability coverage for the year if successful in its claim, the potential recovery did not extend beyond the policy limit. Therefore, the court found that this was not a similar situation to the large tort litigation cases because there were no other litigants "in line" for the proceeds, nor would the payment on the policies impair

any reorganization plans of Fernstrom. Id. (citing **A.H.Robins v. Piccinin,** 788 F.2d 994, 999 (4th Cir.), **cert. denied,** 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986)).

Applying the same rationable to the case **sub judice,** we reach the same conclusion as that reached in **Fernstrom;** that is, we find that the proceeds from an insurance policy are not the property of the bankruptcy estate. Harmon, Sr. was never entitled to the proceeds from the liability policies he purchased from Northern and St. Paul. Moreover, the amount sought by Harmon, Jr. was not more than the full amount of the two policies. There was no evidence that there were any other plaintiffs waiting in the wings to collect from these policies. Furthermore, it is unusual for the plaintiff in a case such as this to seek protection under the umbrella of the

automatic stay provisions; it is usually the defendant who seek relief from pending litigation. Moreover, as the insurers note, since there was never personal jurisdiction obtained over Harmon, Sr., it is disingenuous for Harmon, Jr. to claim that the automatic stay would also apply to his insurers.

CONCLUSION

As we find that the automatic stay provisions of 11 U.S.C. § 362(a) do not apply to co-defendants Northern and St. Paul, and that the insurance proceeds from the policies were not the property of the bankruptcy estate, we dismiss this appeal pursuant to Miss. S.Ct. R. 4(a) for Harmon, Jr.'s failure to file a timely appeal to this Court.

APPEAL DISMISSED.

HAWKINS, C.J., DAN LEE, AND PRATHER, P.JJ., SULLIVAN, PITTMAN, BANKS, McRAE AND SMITH, JJ., CONCUR.